

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Mohammed Reza Enayat

v.

Civil No. 07-cv-72-JD

United States of America

O R D E R

Mohammed Reza Enayat was convicted of receiving a stolen security, specifically a check in the amount of \$113,800. He moved for relief under 28 U.S.C. § 2255 on the ground that his trial counsel provided constitutionally ineffective representation. Enayat argued that his attorney erroneously advised him to reject an advantageous plea agreement, failed to request a continuance to allow more time to prepare for trial, failed to request a handwriting analysis and impeachment materials about a government witness, Beruz Jalili, failed to introduce evidence about the markup taken on Persian rugs, and otherwise failed to present an adequate defense. The court denied Enayat's motion on all grounds.

Enayat moved for reconsideration on his claims that his attorney provided constitutionally ineffective assistance by advising him to reject the plea agreement and by failing to request the government's analysis of Jalili's handwriting. Enayat agreed with the government that a hearing was not

necessary. In his motion for reconsideration, however, he requested a hearing to address the two claims. The government did not respond to the motion for reconsideration.

A hearing was held on March 13, 2008. Enayat and his wife testified in support of his claims. The prosecutor in the criminal case, Terry Ollila; Enayat's former counsel, Robert Jubinville; Bureau of Immigration and Customs Enforcement ("BICE") Special Agent Bleezarde, and Federal Bureau of Investigation ("FBI") Special Agent Mulvaney testified.¹

Discussion

To prevail on an ineffective assistance of counsel claim, Enayat "must show both that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." United States v. De La Cruz, 514 F.3d 121, 140 (1st Cir. 2008). A reasonable probability of a different outcome is the prejudice component of the analysis. Id. In considering an ineffective assistance of counsel claim, the court may address only the

¹The activities now performed by BICE were formerly the responsibility of the Immigration and Naturalization Service, as provided by the Homeland Security Act of 2002. See Clark v. Martinez, 543 U.S. 371, 374 n.1 (2005).

prejudice component if that is dispositive. Id.

A. Plea Agreement

Enayat is a resident alien, whose native country is Iran. Because of that status, his original counsel in the criminal proceeding, William Christie and Steven Gordon, were concerned about the effect of a conviction on his eligibility for removal. They retained an immigration attorney, Desmond Fitzgerald, to advise them about the removal implications in the case.

8 U.S.C. § 1227(a)(2)(A)(iii) provides grounds for removal of an alien who is convicted of an aggravated felony. The definition of aggravated felony includes a conviction for "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year" and "an offense that -- involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." 8 U.S.C. § 1101(a)(43)(G) & (M).

Christie and Gordon negotiated a plea agreement with the government that was intended to address issues which would affect Enayat's eligibility for removal if he were convicted of the crime charged. Under the agreement, the government would have recommended that Enayat be sentenced to five months of imprisonment and five months of home confinement (a sentence of

less than one year), to avoid having the crime qualify as an aggravated felony pursuant to § 1101(a)(43)(G). In addition, counsel discussed with the prosecutor, Terry Ollila, whether the indictment could be amended to delete any reference to the amount of the stolen check, which was \$113,800, because an amount in excess of \$10,000 would make the offense an aggravated felony under § 1101(a)(M).

Before seeking approval for an offer to amend the charge against Enayat, Ollila talked to BICE Special Agent Bleezarde and to a government immigration attorney in Boston about whether the proposed amendment would avoid having Enayat's offense qualify as an aggravated felony under § 1101(a)(M). Ollila was told that because other documents in the case revealed the amount of the stolen check and because the amount would be disclosed during sentencing, an amendment of the indictment would not prevent the crime from being an aggravated felony under § 1101(a)(43)(M). As a result, Ollila did not propose that provision.

Enayat had previously been represented in another matter by Attorney Robert Jubinville and had remained friendly with him. While he was represented by Christie and Gordon, Enayat discussed his case with Jubinville, who recommended that he not accept the plea offer because any prison term would result in his being eligible for removal. Fitzgerald, who was working with Christie

and Gordon, advised that the offered plea agreement gave Enayat the best defense against removal but could not guarantee that he would not be subject to removal proceedings based on the conviction. After weighing the advice he was getting, Enayat decided not to accept the plea, concluding that his best chance of avoiding removal was to be acquitted on the crime charged. He discharged Christie and Gordon and hired Jubinville to represent him for trial.

Enayat was convicted following a guilty verdict in January of 2005. He was sentenced to eighteen months of imprisonment and was required to make restitution in the amount of \$93,800. On appeal, Enayat argued that the district court improperly denied his motion for judgment of acquittal and his motion for a new trial. The First Circuit affirmed in a mandate issued on February 23, 2007.

BICE Special Agent Bleezarde was notified that Enayat's criminal case was complete after the conclusion of his appeal. In a notice of removal proceedings, he charged that Enayat, having been convicted of an aggravated felony under § 1127(a)(2)(A)(iii), was subject to removal because his sentence of imprisonment was longer than a year and because his crime involved fraud or deceit and the loss to the victim exceeded \$10,000. See Plaintiff's Ex. H. Bleezarde also charged that

Enayat was subject to removal because he was convicted of a crime of moral turpitude within five years of the date of his last admission to this country, under 8 U.S.C. § 1127(a)(2)(A)(I). Enayat was served with notice of the removal proceedings on March 29, 2007. The immigration judge found that Enayat was subject to removal on both grounds under § 1127(a)(2)(A)(iii), but not under § 1127(a)(2)(A)(I), because his admission had not been within five years of his conviction.

Enayat argues that Jubinville provided constitutionally ineffective representation by advising him to reject the plea agreement on the mistaken belief that a conviction with imprisonment of any length would subject him to removal proceedings. He contends that he was prejudiced by that advice because he rejected a plea offer that would have allowed him to serve only five months in prison, instead of his sentence of eighteen months, and would have avoided the removal charges based on a sentence of more than one year under § 1101(a)(43)(G), and the amount of the check, under § 1101(a)(43)(M). The evidence does not support Enayat's position with respect to the amount of the check.

The testimony at the hearing showed that Christie, Gordon, and Ollila discussed the possibility of changing the charging document to an information that would charge Enayat with

receiving a stolen security in an amount greater than \$5,000 in violation of 18 U.S.C. § 2315. Ollila would have needed approval to actually offer that part of the agreement, however. When she researched the issue and found that the proposed change would not have avoided the removal consequences, however, she did not seek approval and did not offer that as part of the plea agreement.

In addition, the proposed change in the charging document would not have avoided removal based on an aggravated felony, defined in § 1101(a)(43)(M) as a crime of fraud or deceit involving more than \$10,000, because the amount of the stolen check was readily available to BICE and would have been obtained by that agency from the record in the case, FBI reports, the presentence investigation report, the sentencing proceeding, and the judgment which required restitution.² Because Enayat would have been subject to removal under § 1227(a)(2)(A)(iii) even if he had been offered and had accepted the plea agreement with a recommended sentence of five months imprisonment and five months home confinement and an amended charging document, Jubinville's advice to reject the offer did not result in any prejudice.

The bottom line is that all of Enayat's attorneys told him

²Because the immigration judge found that receiving the check in violation of § 2315 was a crime of fraud or deceit under § 1101(a)(43)(M), that issue is not considered here.

that a conviction, whether by guilty plea or by jury, carried with it removal consequences. He considered all of the advice he had received, weighed his options, and voluntarily made a strategic decision to go to trial with the hope of gaining an acquittal, thereby avoiding removal. He was convicted and now faces the same removal consequences as he would have faced had he entered a guilty plea under the plea agreement that was being proposed.

B. Handwriting Analysis

The stolen check was mistakenly put into Beruz Jalili's business post office box. Jalili discussed the check with his friend, Enayat, and then sent the check to him. Enayat delivered the check to his friend, Stuart Carpenter, who owned a car dealership, and asked Carpenter to deposit the check in his business account, which he did.

The check was made payable to Innuendo, LLC, from QAD, Inc. and had been endorsed "Innuendo, LLC" when it was deposited by Carpenter. When the check was returned to QAD with a forged endorsement and QAD contacted the bank, the FBI began an investigation that led to Enayat.

Jalili testified as a government witness at trial. During his testimony, Jalili stated that the FBI had taken a sample of

his handwriting for analysis. Enayat contends that Jubinville should have requested the handwriting analysis to determine whether it supported a theory that Jalili endorsed the check, which would undermine Jalili's credibility as a witness against him.

In opposition to Enayat's motion for \$ 2255 relief, the government contended that Enayat was not prejudiced by Jubinville's failure to request the handwriting analysis because no handwriting analysis was ever done and because evidence that Jalili endorsed the check would not be sufficient to show a reasonable probability that the outcome of the criminal case would have been different. The government, however, failed to provide any evidence to show that no handwriting analysis was ever done. The court agreed that evidence that Jalili forged the endorsement was not sufficient to support the ineffective assistance claim. However, the court ordered the government to produce evidence at the hearing concerning whether any handwriting was ever taken.

At the hearing, FBI Special Agent Mulvaney, who investigated the case, testified that no handwriting sample was ever taken from Jalili and no analysis was ever done of his handwriting. He testified that neither he nor the other FBI agent who was briefly involved with Jalili in California asked for or obtained a

handwriting sample. He also explained the process of obtaining a handwriting sample and a handwriting analysis and the documents that are generated during that process, none of which exist in this case. Therefore, Enayat was not prejudiced by Jubinville's failure to request an analysis that did not exist.

Conclusion

For the foregoing reasons, the plaintiff's motion for reconsideration (document no. 21) is denied.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
United States District Judge

March 14, 2008

cc: Edward Juel, Esq.
Aixa Maldonado-Quinones, Esq.
Robert Veiga, Esq.